Supreme Court, U.S.
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NO._____

In the
Supreme Court of the United States

OCTOBER TERM, 1996

D. J. (BUD) WHITE,

Petitioner,

v.

RUSH HEALTH SYSTEMS, INC.

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth District

---

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTIONS PRESENTED

1. The U.S. Supreme Court should grant Petitioner's Writ of Certiorari in order to resolve the current conflicts that exist among the 5th, 2nd, 10th, 9th, 4th, 1st, 7th, and 6th Court of Appeal of the United States as represented by the vaying, differing and conflicting standards for constructive discharge under Age Discrimination in Employment Act, 29 U.S.C. 621 et seq. (ADEA) presently being followed by those respective Courts; and to correct the error by the Fifth Circuit Court of Appeals by failing to follow its guidelines set out in Barrow v. New Orleans S. S. Ass'n. 10 F.3d 292, 297 (5th Cir. 1994), in reaching its conclusion in the subject case which upheld the erroneous conclusion of the U. S. District Court. Petitioner was denied his day in Court before a jury of his peers on the issue of his constructive discharge by his employer due to his age.

2. Whether the Circuit Court fundamentally altered the requirements of proof in a showing of constructive discharge in holding that the petitioner failed to make out a prima facie case.

LIST OF PARTIES

The parties to the proceeding below were the petitioner D.J. (Bud) White. The respondent before this Court is Rush Health Systems, Inc.[1]

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[1] Rush Health Systems, Inc. is the parent company of Rush Foundation Hospital which was one of the original defendants in this matter which was dismissed by a lower court ruling. The lower Court also dismissed as individual in this matter the following parties: James C. McElroy, Jr., President of Rush Health Systems, Inc.; Wallace Strickland, Administrator, Rush Foundation Hospital; Timothy H. Moore, Personnel Director, Rush Foundation Hospital; Darrell Wildman, Chief Financial Officer, Rush Foundation Hospital; Rick Beasley, Material Manager, Rush Foundation Hospital.

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STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals entered its judgment on May 9, 1996. App. 3a. This opinion was not published. The Petitioner moved for rehearing en banc within the allowable time. The Fifth Circuit Court of Appeals entered a order treating this request as both a petition for panel rehearing and as a petition for rehearing en banc; both were denied. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

This case involves the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, which provides in pertinent parts as follows:

> **§ 623. Prohibition of age discrimination**
>
> **(a) Employer practices.** It shall be unlawful for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

STATEMENT OF THE CASE

A. The Proceedings Below

This action was filed by petitioner, D.J. (Bud) White ("White"), in the United States District Court for the Southern District of Mississippi Eastern Division on June 27, 1994. The complaint alleged that Mr. White was forced to retire (constructively discharged) from his place of employment because of his age, in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. sections 621 et seq. ("ADEA"). App. 10a.

The petitioner further filed a Notice of Request and Demand for a Jury Trial on July 5, 1994.

The defendants, Rush Health Systems, Inc., et al, ("Rush"), respondent here, filed their motion for summary judgment on April 24, 1995

The District Court granted Rush's motion for summary judgment with a Memorandum Opinion and Order on July 7, 1995. App. 9a.

The District Court entered a Final Judgment in this matter on July 14, 1995. App. 7a.

White filed his notice to appeal to United States Court of Appeals for the Fifth Circuit on August 4, 1995. App. 5a.

Oral arguments on this case were heard before a panel of judges from the Fifth Circuit on April 29, 1996.

The United States Court of Appeals for the Fifth Circuit issued a written opinion affirming the District's Court opinion on May 9, 1996. App. 3a.

The United States Court of Appeals for the Fifth Circuit denied petitioners request on June 5, 1996 for the matter to be reheard on a suggestion for rehearing en banc. App. 1a. This petition for a writ of certiorari follows.

B. Statement of the Facts

The Petitioner was sixty-five (65) years when he was forced into retirement by the actions of the respondent. He had been employed at Rush Foundation Hospital from 1965 and at the time of his forced retirement his job title was called purchasing manager.

During the time in which the petitioner's responsibilities were being taken away, a so called new position of materials manager was created by respondent's management team. This position was filed by Rick Beasley age thirty-seven (37) years old. App. 10a.

After Beasley took over petitioner's responsibilities as a supervisor, he immediately started to take all of petitioner's work responsibilities away.

Cosondra Moffett stated in her depositional testimony "That Mr. Beasley offered me and Monica Vance the positions of Office Manager and Warehouse Manager in effect to completely phase out and replace Mr. D.J. (Bud) White at R.F.H.. Mr. Beasley would retain the position and responsibilities of being the purchasing agent for R.F.H.."

Monica Vance stated in her depositional testimony that Rick Beasley had no additional duties or job functions then the petitioner. Mr. Beasley had taken over the petitioner's job.

The petitioner was also denied computer training on the new computer system that was being installed into his department. Rush employee Cosondra Moffett stated in her testimony that:

> [t]o my knowledge Mr. White was never offered computer training on the new computer system that was being installed in the purchasing department. Myself and other office employees in the purchasing department at R.F.H. were offered computer training. Mr. White came to me. I showed him how to work it. ... The Owen people

> who installed the new computer system at the *hospital, from the start treated Mr.* White with no respect and treated him like he was a nobody.

Further Rush employee Kristi Lanterman stated in her depositional testimony:

> [t]o my knowledge Mr. White was never offered computer training on the new computer system that was being installed in the purchasing department. Ann Murphy from Owen stated that they were not going to waste time trying to teach him how to use the new system. She made the statement that Bud would be leaving soon.

The petitioner had no choice in the matter involving his job. He tried to hold onto it as long as possible, however, the facts are he was being out do to his age.

The petitioner went to the EEOC office in Jackson, Mississippi on January 17, 1994 and filed his affidavit alleging Age Discrimination in violation of ADEA. The EEOC issued D.J. White a right to sue letter on March 3, 1994. The petitioner filed his Complaint on June 27, 1994.

REASONS FOR GRANTING THE WRIT

1. The U.S. Supreme Court should grant Petitioner's Writ of Certiorari in order to resolve the current conflicts that exist among the 5th, 8th, 2nd, 10th, 9th, 4th, 1st, 7th, and 6th Courts of Appeal of the United States as represented by the vaying, differing and conflicting standards for constructive discharge under Age Discrimination in Employment Act, 29 U.S.C. 621 et seq. (ADEA) presently being followed by those respective Courts; and to correct the error by the Fifth Circuit Court of Appeals by failing to follow its guidelines set out in Barrow v. New Orleans S. S. Ass'n. 10 F.3d 292, 297 (5th Cir. 1994), in reaching its conclusion in the subject case which upheld the erroneous conclusion of the U. S. District Court. As a result, the Petitioner was denied his day in Court before a jury of his peers on the issue of his constructive discharge by his employer due to his age.

This Petition for Writ of Certiorari shows the respective Circuit Courts of Appeal all differ in the definition of what is or is not constructive discharge under ADEA with the exception of Fifth Circuit Court of Appeals. Throughout the other Circuits of the United States there is no standard to determine what is or is not constructive discharge other than the "reasonable persons standard", which is interpreted differently by the various Circuit Courts of Appeal.

The Fifth Circuit Court of Appeals in Barrow v. New Orleans S. S. Ass'n. 10 F.3d 292, 297 (5th Cir. 1994), set out seven factors to be considered by a Court in determining whether or not a prima facie case re constructive discharge is established.

Then the Fifth Circuit Court of Appeals in the present case failed to follow its criteria for constructive discharge is set out in the Barrow case. The seven factors to be considered by a Court in determining whether a prima facie case of constructive discharge

exists under the ADEA, which factors are to be considered singly or in combinations:

(1) demotion;
(2) reduction in salary;
(3) reduction in job responsibilities;
(4) reassignment to menial or degrading work;
(5) reassignment to work under a younger supervisor;
(6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or
(7) offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not.

The Fifth Circuit Court of Appeals did not follow its' own criteria. As a result, the Fifth Circuit Court of Appeals is not in harmony with itself and a conflict exists that only this Court can address.

There is no standard to decide what is and what is not constructive discharge among the other circuit courts. The so called standard is the "reasonable persons standard".

However, this "reasonable person standard" varies on what circuit your suit arises.

The Eighth Circuit Court of Appeals stated in Smith v. World Ins. Co., 38 F.3d 1456, 1461 (8th Cir. 1994), citing Hukkanen v. International Union of Operating Eng'r, 3 F.3d 281, 285 (8th Cir.1993):

> [T]he plaintiff must also show that the employer created the intolerable condition intending to force the plaintiff to quit. Id. The plaintiff can satisfy the intent requirement by demonstrating that he or she quit as "a reasonable foreseeable consequence of {the} employer{'s} discriminatory actions." Hukkanen v. International Union of Operating Eng'r, 3 F.3d 281, 185 (8th Cir. 1993).

Therefore under the Eighth Circuit Court's interpretation, it would be the "reasonably foreseeable consequence" standard.

The Tenth Circuit Court of Appeals set it's standard to prove constructive discharge in the case of Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986), cited in Acrey v. American Sheep Industry Ass'n, 981 F.2d 1569, 1573, 1574 (10th Cir. 1992) :

> [W]e have defined the standard for constructive discharge as whether the employer's illegal discriminatory acts fostered a climate in the workplace that would compel a reasonable person to resign. Derr v. Gulf Oil Corp., 796 F.2d 340, 344 (10th Cir. 1986).

The Court in Acrey at 1574, further stated that although the plaintiff in this case had stated that her resignation was tendered because "she was `too tired' to fight", she had "presented sufficient evidence to support the jury's determination that she was constructively discharged."

Therefore under the Tenth Circuit Court of Appeals the standard would be a modest "reasonable person standard".

The Ninth Circuit Court of Appeals restated its' standard for constructive discharged in Schnidrig v. Columbia Machine, Inc., 80 F.3d 1406, 1411 (9th Cir.1996), citing Steiner v. Showboat Operating Co., 25 F.3 1459, 1465 (9th Cir.1994), (quoting Thomas v. Douglas, 877 F.2d 1428, 1434 (9th Cir.1989)), when the Court stated:

> [T]o establish a claim for constructive discharge, Schnidrig "must show there are triable issues of fact as to whether 'a reasonable person in [his] position would have felt that [he] was forced to quit because of intolerable and discriminatory conditions.'" Steiner v. Showboat Operating Co., 25 F.3d 1459, 1465 (9th Cir. 1994), (quoting

> Thomas v. Douglas, 877 F.2d 1428, 1434 (9th Cir. 1989)).

Under the Ninth Circuit the plaintiff "must show triable issues of fact" and that the conditions must be both intolerable and discriminatory. Therefore this Circuit Court is not in harmony with the other circuit courts.

The Fourth Circuit Court of Appeals held in Shealy v. Winston, 929 F.2d 1009, 1013 (4th. Cir.1991), that:

> in order to establish a constructive discharge, the employee must show the deliberateness of the employer's actions and the intolerability of the working conditions.

Therefore the Fourth Circuit again has a standard not shared by the other Circuits and there exists a need by this Court to deliver a unified standard on what constitutes "Constructive Discharge".

The First Circuit Court of Appeals restated its constructive discharge standard in Greenberg v. Union Camp Corp., 48 F.3d 22, 27 (1st Cir. 1995) when it stated:

> to establish a claim of constructive discharge, the evidence must support a finding that "`the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'" Calhoun v. Acme Cleveland Corp., 798 F.2d 559, 561 (1st Cir.1986) (quoting Alicea Rosado v. Garcia Santiago, 562 F.2d 114, 119 (1st Cir. 1977)).

The standard for the First Circuit is the "reasonable person standard"; but what constitutes a reasonable person in connection with constructive discharge when there are no guideline factors to

follow. The factors for which the reasonable person should be guided, needs to be delivered by this Court.

The Second Circuit Court of Appeals stated in Spence v. Maryland Cas. Co., 995 F.2d 1147, 1156 (2nd. Cir. 1993) that:

> a constructive discharge cannot be proven merely by evidence that an employee disagreed with the employer's criticisms of the quality of his work, or did not receive a raise, or preferred not to continue working for that employer. Nor is the test merely whether the employee's working conditions were difficult or unpleasant. See, e.g., id.; Clowes v. Allegheny Valley Hospital, 991F. 2d 1159, 1162 (3rd Cir.1993); cf.Martin v. Citibank, N.A., 762 F.2d 212, 221 (2nd Cir. 1985).

Further the Court in Spence at 1156, stated that:

> [A] constructive discharge may be found on the basis of evidence that an employer deliberately sought to place an employee in a position that jeopardized his or her health. See, e.g., Meyer v. Brown & Root Construction Co., 661 F.2d 369, 371-72 (5th Cir.1981).

Therefore the Second Circuit has established certain factors that allow for the trier of fact to find for a plaintiff in a case of constructive discharge. However its overall standard to determine what constitutes constructive discharge is still rather vague at best.

The Seventh Circuit Court of Appeals has restated its standard for constructive discharge in the case of Darnell v. Target Stores, 16 F.3d 174, 177 (7th Cir.1994) where the Court stated that:

> [D]emonstrating constructive discharge requires a showing that a "reasonable employee would have felt compelled to resign under the circumstances of the case." Rodgers v. Western-Southern Life Ins. Co., 12

F.3d 668, 677 (7th Cir.1993) (citing Brooms v. regal Tube Co., 881 F.2d 412, 423 (7th Cir.1988).

The Sixth Circuit Court of Appeals stated in Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510, 515 (6th Cir.1991) what its standard is for the proof of constructive discharge as being:

> "so difficult or unpleasant that areasonable person in the employee's shoes would have felt compelled to resign". Yates v. Avco Corp., 819 F.2d 630, 636-37 (6th Cir.1987); Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982).

The Seventh and Sixth Circuit again places the trier of fact in a most difficult position on judging, without the guidance of factors, on what constitutes a standard to determine what is constructive discharge.

The Supreme Court should grant this Petition to reconcile a serious circuit conflict, and to provide needed coherence to an unsettled and vitally important area of the federal age discrimination law.

2. Whether the Circuit Court fundamentally altered the requirements of proof in a showing of constructive discharge in holding that the petitioner failed to make out a prima facie case.

The Petitioner made out a prima facie case of Age Discrimination under the ADEA. The Petitioner showed that he was constructively discharged under the standards and proof established by the Fifth Circuit Court of Appeals in Barrow v. New Orleans S.S. Ass'n, 10 F.3d 292, 297 (5th Cir.1994).

The Fifth Circuit Court of Appeals ruled in the Barrow case that seven factors should be used to consider whether a reasonable employee would feel compelled to resign [retire]. These factors are to be used singly or in combinations:

> (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or

> degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not.

The Petitioner showed that he could meet five of the seven factors with regards to the proof required under the Barrow standard. However the Circuit Court refused to follow the Barrow standard in a showing of what constitutes constructive discharge under the reasonable person standard.

Moreover, by the Circuit Court failing to follow the seven factors of Barrow or trying to distinguish the present case with Barrow, the Court has not maintained uniformity of its decisions.

Therefore the Fifth Circuit Court of Appeals is not in harmony with itself and a conflict exists that only this Court can address. Petitioner was denied his day in Court before a jury of his peers on the issue of constructive discharge by his employer due to his age.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of lower courts should be reversed.

Respectfully submitted,

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APPENDIX A- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JUNE 5, 1996

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 95-60487

D. J. (BUD) WHITE
PLAINTIFF - APPELLANT

V.

RUSH HEALTH SYSTEMS, INC., and its subsidiary; RUSH FOUNDATION HOSPITAL; JAMES C. MCELROY, JR., President of Rush Health Systems, Inc.; WALLACE STRICKLAND, Administrator, Rush Foundation Hospital; TIMOTHY H. MOORE, Personnel Director, Rush Foundation Hospital; DARRELL WILDMAN, Chief Financial Officer, Rush Foundation Hospital; RICK BEASLEY, Material Manager, Rush Foundation Hospital

DEFENDANTS - APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 05/09/96, 5 Cir., _____, _____ F.3d_____)

(June 05, 1996)

Before Circuit Judges:
GARWOOD, HIGGINGBOTHAM and BENAVIDES

PER CURIAM:

Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Clerk

APPENDIX B- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED MAY 9, 1996

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 95-60487

D. J. (BUD) WHITE
APPELLANT

V.

RUSH HEALTH SYSTEMS, INC., and its subsidiary; RUSH FOUNDATION HOSPITAL; JAMES C. MCELROY, JR., President of Rush Health Systems, Inc.; WALLACE STRICKLAND, Administrator, Rush Foundation Hospital; TIMOTHY H. MOORE, Personnel Director, Rush Foundation Hospital; DARRELL WILDMAN, Chief Financial Officer, Rush Foundation Hospital; RICK BEASLEY, Material Manager, Rush Foundation Hospital

APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
(4:94-CV-62-LN)

Before Circuit Judges:
GARWOOD, HIGGINGBOTHAM and BENAVIDES

PER CURIAM:*

In this age discrimination case, appellant, D. J. "Bud" White appeals from a summary judgment granted in favor of appellee Rush Health Systems, Inc. ("Rush") on the grounds that White failed to make a prima facie case of constructive discharge. We affirm.

White's lawsuit stems from events surrounding the computerization of Rush's purchasing department where White had been the purchasing agent. Following the decision to automate purchasing procedures, Rick Beasley, a thirty-seven year old employee, was assigned to head the department. White retained his title, but Beasley had the responsibility for automation. As a result of the computerization, many of White's old duties became obsolete. White asserts that Beasley took over or reassigned all of White's job functions leaving him with essentially nothing to do. Despite the transfer of job responsibilities, it is undisputed that White suffered no decrease in pay, benefits, or hours of employment. His job title did not change. He was never asked to resign or retire. On March 15, 1994, White met with the personnel director who explained to White his job duties post-computerization. Nonetheless, two days later, White, who had been an employee of Rush for twenty-eight years, resigned at the age of sixty-five.

White then sued Rush[1] alleging that he was constructively discharged on account of his age in violation of the Age Discrimination in Employment Act ("ADEA"). Rush moved for summary judgment on the basis that White failed to make a prima

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4

1 Rush also named several individual employees in the lawsuit. The district court dismissed the claim against the individual employees because they were not "employees" under the ADEA. White does not challenge this on appeal.

facie case of constructive discharge. The district court agreed; this appeal ensued.

We review a summary judgment under well-established standards. Blakeny v. Lomas Info Sys., Inc., 65 F.3d 482, 484 (5th Cir. 1995); see Sterling Property Management, Inc. v. Texas Commerce Bank, Nat'l Ass'n, 32 F.3d 964, 966 (5th Cir. 1994).

The district court properly denied White's ADEA claim because White failed to make a prima facie showing of constructive discharge. To establish a prima facie case of age discrimination, the plaintiff must initially establish that he was discharged. Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 992 (5th Cir. 1996) (en banc). Because White was not actually discharged, he must show constructive discharge. Constructive discharge occurs when the working conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to retire. McCann v. Litton Sys., Inc., 986 F.2d 946, 951 (5th Cir. 1993).

White cannot make a prima facie showing of constructive discharge on the summary judgment evidence presented. Accepting White's testimony as true, at most, White can only demonstrate that his job functions were given to other employees.[2] It is undisputed that he retained his job title, salary, benefits, and hours. Consequently, none of the usual inducia of a constructive discharge are present. See McKethan v. Texas Farm Bureau, 996 F.2d 734, 741 (5th Cir. 1993) (describing demotion, performance of inconsistent or more onerous duties, and reduced pay as usual factors surrounding constructive discharge), cert. denied, 114 S. Ct. 694 (1994). Being retained in a newly-created position "without a description and little in the way of job duties" does not reach the level of constructive discharge. See McCann, 986 F.2d at 949, 951-2; see also Jett v. Dallas Indep. Sch. Dist., 798 F.2d 748, 755 (5th Cir. 1986) (demotion of high school athletic director to a non-

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[2] Rush hotly contests this issue contending that White still retained significant job functions.

coaching position did not establish constructive discharge), aff'd in part and rev'd in part on other grounds, 491 U.S. 701 (1989); Jurgens v. EEOC, 903 F.2d 386, 392 (5th Cir. 1990) (demotion, plus a pay-cut, and loss of supervisory duties did not amount to constructive discharge).

White also fails to demonstrate any additional aggravating factors to implicate constructive discharge. He was not forced to train his new supervisor. There is no summary judgment evidence that White was harassed about his retirement plans. Likewise, there is no summary judgment evidence that White was humiliated by his supervisors.[3] Furthermore, White did not pursue internal grievance procedures that we have counseled is necessary before resignation for constructive discharge. See McKethan, 996 F.2d at 741; Ugalde v. W. A. McKenzie Asphalt Co., 990 F.2d 239, 243 (5th Cir. 1993). Finally, we note that when asked in his deposition why he retired White did not articulate a forced a constructive discharge, but instead stated that he anticipated someone would eventually "get up enough nerve to tell me to go home permanently" and indicated his belief that once he sued the company he could not continue to work there. Under the particular circumstances, no reasonable employee would have felt compelled to resign. See Barrow v. New Orleans Steamship Ass'n, 10 F.3d 292, 297 (5th Cir. 1994).

The judgment of the district court is AFFIRMED.

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[3] White's testimony is that he resigned because he had nothing to do. While one co-worker's affidavit includes a conclusory statement that Beasley "when possible, tried to put down and humiliate Mr. White," there is no summary judgment evidence that this was ever done in White's presence. As such, White could not have been influenced to resign by this alleged humiliation. See McKethan, 996 F.2d at 741 (holding that derogatory comments made at awards banquet in front of employee insufficient to show constructive discharge).

APPENDIX C - FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN OF MISSISSIPPI EASTERN DIVISION DATED JULY 17, 1995

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. 4:94-CV-62 (L) (N)

D. J. (BUD) WHITE,

Plaintiff,

v.

RUSH HEALTH SYSTEMS, INC.,
AND ITS SUBSIDIARY; RUSH
FOUNDATION HOSPITAL, ET AL

Defendant.

FINAL JUDGMENT

This cause came on for hearing on the motion of Defendant for summary judgment. After consideration of the motion, evidence offered in support of the motion, and the memoranda of the parties, the Court finds that the motion is well taken and should be granted. The Memorandum Opinion and Order of this Court filed July 7, 1995, and the Findings of Fact and Conclusions of Law included therein are incorporated herein by reference. For the reasons assigned in that Memorandum Opinion and Order, the Court concludes that judgment should be entered in favor of the Defendant

and against the Plaintiff and that the Defendant should be awarded its costs.

IT IS THEREFORE, ORDERED AND ADJUDGED that the complaint be, and it is hereby DISMISSED WITH PREJUDICE in accordance with this Court's Memorandum Opinion and Order at the cost of the Plaintiff.

IT IS FURTHER ORDERED AND ADJUDGED that the Defendant is entitled to recover its taxable costs in this action upon filing a Bill of Costs in the time and manner prescribed.

SO ORDERED AND ADJUDGED, THIS THE 14th day of July, 1995.

/S/ TOM S. LEE
UNITED STATES DISTRICT JUDGE

APPENDIX D - MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI FILED JULY 7, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CIVIL ACTION NO. 4:94CV62(L)(N)

D. J. "BUD" WHITE,

Plaintiff,

v.

RUSH HEALTH SYSTEMS, INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

This cause is before the court on the summary judgment motion of all defendants. The court, having considered the motion, response, briefs and exhibits, concludes that defendants' motion should be granted.[4]

Plaintiff D. J. "Bud" White was employed by defendant Rush Foundation Hospital, a subsidiary of defendant Rush Health Systems, Inc. (together "Rush"), for approximately twenty-eight

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[4] Defendants have also moved to strike portions of affidavits filed by plaintiff in his response to their motion for summary judgment. Because the court will grant defendants' motion for summary judgment, the motion to strike is rendered moot.

years. On March 7, 1994, at the age of sixty-five, he tendered his resignation to Rush and soon thereafter, upon receiving a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), filed this lawsuit alleging that he had been constructively discharged on account of his age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. Plaintiff's charge of age discrimination stems from a series of events associated with the computerization of Rush's purchasing department, where plaintiff worked. He contends that these events ultimately culminated in his constructive discharge.

Plaintiff was the purchasing agent at the hospital for a number of years, when, in the early 1990s, a determination was made to upgrade and automate purchasing procedures at the hospital. To facilitate the conversion, Rick Beasley, a thirty-seven year old, was transferred in to head the department. White retained the title of purchasing agent, but Beasley in fact took charge of the process of automating the department, and he continued to run the department once the automated systems were in place.[5] According to plaintiff, by September 1993, Beasley, in the newly-created position of materials manager for the purchasing department, had either taken over or otherwise reassigned all of the plaintiff's important job functions. Whereas plaintiff had once been responsible for supervising the department's employees, talking to sales representatives, negotiating prices and working with other department heads and physicians, Beasley assumed these duties. Additionally, Beasley placed Kristi Lanterman, hired after the computerized system was implemented, in charge of distributing supplies from inventory, a job function previously performed by plaintiff; Cossandra Moffett, who had been under plaintiff's

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[5] Defendants have presented extensive evidence that White was uncooperative and even openly hostile to the process of computerizing the purchasing department. White disputes this claim and says that while he was not opposed to computerization, he did not approve of the particular system being installed.

supervision, took over plaintiff's duty of approving invoices, and Monica Vance, another new employee, began ordering, accounting and maintaining inventory, other functions that had been performed by plaintiff. Plaintiff and Vance shared an office and desk which plaintiff had previously had to himself. All of these changes left plaintiff with very little work or responsibility. Plaintiff testified, "I was left with nothing to do but opening the mail. Then it was given to Moffett also." Nevertheless, plaintiff also testified that he suffered no diminution in pay, benefits or hours of employment; nor did his job title change, rather Rick Beasley, as materials manager is alleged to have usurped all of White's authority and responsibility.[6] Finally, in March 1994, plaintiff resigned. He claims in this lawsuit that defendants' actions forced him into retirement, or in other words, that he was constructively discharged. And he claims that this occurred because of his age.

Initially, the court observes that in addition to Rush, plaintiff has named as defendants a number of his fellow Rush employees, most of whom occupied superior or supervisory positions,[7] who, along with Rush, are alleged to have caused, for

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[6] For the purposes of this motion, the court has considered as true facts as presented by the non-moving party; however, the court notes that defendant has offered affidavit testimony that plaintiff retained significant duties in the purchasing department, and that as late as March 15, 1994, two days before White tendered his resignation, Timothy Moore, the hospital's personnel director, and Darrell Wildman, the Chief Financial Officer, met with White to assure him that, although the process of automation meant some functions would be performed differently, his responsibilities as purchasing agent would remain as they had been in the past.

[7] He alleges that these defendants, like Rush, discriminated against him because of his age in violation of the ADEA. As to the individual defendants, plaintiff does not allege that they committed any torts against him. Rather, he seems to have included them in the category of his "employer," alleging that he was "an employee of the Defendants as the term 'Defendants' is defined in the Age Discrimination in Employment Act, 29 U.S.C. 630(f), "which defines "employee." The court is unaware of any definition of "defendant" in the act.

discriminatory reasons, plaintiff's forced retirement. It is clear in this circuit that individual employees are not subject to suit under Title VII, which defines "employer" to mean "a person engaged in an industry affecting commerce who has fifteen or more employees. . . .and any agent of such a person. . . ." 42 U. S. C. § 20000e(b). Grant v. Lone Star Co., 21 F.3d 649 (5th Cir.), cert. denied, 115 S. Ct. 574 (1994). Rather, the phrase "agents of such a person" is included in the definition so that the actual employers may be held liable through respondeat superior for the acts of their agents. Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 584 (9th Cir. 1993), cert. denied, 114 S. Ct. 1049 (1994). By analogy, this proposition holds true for the ADEA as well, which defines "employer" similarly as "a person engaged in an industry affecting commerce who has twenty or more employees. . . . The term also means (1) any agent of such a person . . . ." 29 U.S.C. § 630(b).[8] Accordingly, individual employees of Rush, named by plaintiff, are not employers under the ADEA and for that reason, are due to be dismissed. The court's further conclusion, applicable to all defendants, that plaintiff cannot establish the elements of his claim, also compels the conclusion that plaintiff's allegations as to the nearly total elimination of his job responsibilities and duties, plaintiff still cannot prevail since he cannot prove he was constructively discharged.

The court construes this statement by plaintiff as an allegation that all defendants were employers within the meaning of 29 U.S.C. § 630 (b).

[8] Moreover, the Fifth Circuit utilizes the same "hybrid economic realities/common law right of control test" to determine the existence of an employment relationship under Title VII and the ADEA, see Barrow v. New Orleans S. S. Ass'n, 932 F.2d 473 (5th Cir. 1991), and the standards governing the parties' burdens and the order of proof under both acts are analogous, see Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 n. 7 (5th Cir. 1993). Thus resolution of the issue of individual employees' exposure to suit under the ADEA should likewise be guided by Title VII principals.

To establish a prima facie case of age discrimination, the ADEA plaintiff must demonstrate (1) that he was actually or constructively discharged; (2) that he was qualified for the position; (3) that he was within the protected class at the time of discharge; (4) and that he was either (a) replaced by someone outside the protected class, (b) replaced by someone younger, or (c) otherwise discharged because of his age. See Bodenheimer v. PPG Indus. Inc., 5 F.3d 955, 957 (5th Cir. 1993); McCann v. Litton Sys., Inc., 5 F.2d 946, 950 (5th Cir. 1993). Here, it is undisputed that White was not actually discharged, but rather resigned; therefore, he must prove he was constructively discharged. The Fifth Circuit has said that "[c]onstructive discharge occurs when 'the working conditions are so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to [retire].' " McCann, 986 F.2d at 951 (quoting Bourque v. Powell Electrical Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980)). The inquiry is not whether the employee in fact felt compelled to resign, but whether an objectively reasonable person would have been compelled to resign. Id.

In support of his constructive discharge claim, plaintiff has presented deposition testimony and affidavits of witnesses who state that Rick Beasley excluded him from department meetings and often stated to others--but not to the plaintiff--that he wished plaintiff would "go on and go home"; in other words, that he wished White would retire. However, even accepting as true that Beasley was "adamant" about plaintiff's retirement, but noting the absence of evidence that Beasley ever said anything in that vein to plaintiff himself, the court concludes this evidence is insufficient to support a finding of constructive discharge.

The burden to prove constructive discharge is a heavy one. The Fifth Circuit has considered numerous cases in which working conditions were far less than pleasant, but in which the court has nevertheless concluded that the correct path would have been for a would-be plaintiff to remain in his job and seek remedies in court, especially given the statutory protections against retaliatory

discharge. See e.g., Vaughn v. Pool Offshore Co., 683 F.2d 922 (5th Cir. 1982) (racially offensive work environment and extended working hours not constructive discharge); Jett v. Dallas Indep. School Dist., 798 F.2d 748 (5th Cir. 1986), modified on other grounds, 109 S. Ct. 2702 (1989) (demotion from head football coach at one high school to freshman coach at another not constructive discharge). In this regard, the parallels between this case and McCann v. Litton Systems, Inc., 986 F.2d 946 (5th Cir. 1993), are worth nothing. In McCann, the plaintiff, as White here, alleged that his employer forced him into retirement. McCann was sixty-seven years old and had been employed as an engineer by Litton for sixteen years. A thirty-three-year-old employee was transferred into a position very similar to McCann's. McCann testified that he intended to work until about age seventy, but that his employers "hounded" him with questions about his retirement plans and placed him in a new position with no job description and very few duties. Later, McCann was given the option, as part of a company-wide reduction in force, of either retiring or transferring to a new position with decreased pay under a much younger man and being "deprived of his secretary and subordinates." He chose to retire and filed suit charging constructive discharge. The Fifth Circuit held that these events, culminating in the prospect of a cut in pay and loss of supervisory responsibilities, did not amount to constructive discharge. Id. at 952. The court here likewise concludes that the facts shown by plaintiff will not support his claim.[9]

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[9] Because plaintiff has not carried the burden of his prima facie case, the arguments of the parties regarding the issue of the availability of punitive damages under the ADEA are moot and will not be addressed.

For the foregoing reasons, the defendants' motion for summary is granted. A separate judgment will be entered in accordance with Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED this the 7th day of July, 1995.

/S/ TOM S. LEE
UNITED STATES DISTRICT JUDGE